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No. 615

In the Supreme Court of the United States

OCTOBER TERM, 1959

R. L. BRADFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

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Assistant Attorney General,

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OPINIONS BELOW

The opinion of the court of appeals (R. 47-48) has not yet been reported. The opinion of the district court appears at pages 22-26 of the record.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1959. A petition for rehearing was denied on November 30, 1959. The petition for a writ of certiorari was filed on December 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a judgment on a plea of guilty should have been voided on a writ of error *coram nobis*, after sentence had been fully served, on the ground that petitioner did not have counsel when he appeared before the grand jury, while under an indictment, pursuant to a subpoena to produce corporate books.

STATEMENT

In December, 1949, during trial in the United States District Court for the Southern District of New York, petitioner pleaded guilty to four counts charging mail fraud violations. He was sentenced to concurrent terms of imprisonment of one year and one day on counts 1 and 2 and to three years' probation on counts 3 and 4 to commence upon the expiration of his term of imprisonment. Petitioner's sentences have been fully served, but petitioner has, nevertheless, instituted numerous proceedings seeking to have the judgment set aside (see R. 47).

The contention raised in the instant proceeding, that petitioner had not been represented by counsel when summoned before a grand jury to produce corporate books while he was under indictment, had been raised in a motion to vacate sentence under 28 U.S.C. 2255, and had been the subject of a hearing before Judge Kaufman. In denying that motion, the court found that petitioner had consulted counsel prior to appearing before the grand jury; that petitioner had been fully apprised of his privilege against self-incrimination; that he had been summoned only as

an officer of the corporation to produce certain specific books and records; and that when petitioner objected to testifying as to the location of the corporate records on the ground of self-incrimination he was immediately excused from testifying (R. 36-46). An appeal in that proceeding was dismissed for lack of jurisdiction since petitioner was not in custody, 194 F. 2d 197 (C.A. 2), and certiorari was denied by this Court, 343 U.S. 979.

The contention that petitioner had improperly been summoned before the grand jury as a defendant was made in an application for a writ of error *coram nobis* on which petitioner was accorded a hearing before Judge Weinfeld in 1954. The decision denying that motion is reported at 122 F. Supp. 915, appeal dismissed for want of prosecution.

The present proceeding instituted in July, 1958, alleged that petitioner's appearance before the grand jury vitiated the judgment because he did not have counsel personally present at the time he gave testimony (R. 3-6). The district court overruled the motion, relying largely on the prior opinions, but pointing out also that petitioner's contentions would not in any event serve to vitiate a judgment entered on a plea of guilty knowingly made in the midst of trial (R. 22-26). The court of appeals affirmed on the opinion of the district court (R. 47-48).

In brief, the facts as they appear from the prior opinions, and the record in this case, are that petitioner and his corporation, Business Research Inc., were indicted for mail fraud on October 27, 1949. On October 31, 1949, petitioner, who was represented

by counsel, entered a plea of not guilty on behalf of himself and the corporation. Thereafter he was served with a subpoena duces tecum to produce books and records of the corporate defendant. His testimony before the grand jury is included in the present record (R. 6-10). He was advised of his privilege against self-incrimination and stated that he had consulted with his counsel before coming before the grand jury. He was then asked various questions as to the whereabouts of the books of the corporation and as to the status of various persons thought to be associated with it who might know where the books would be located. Petitioner objected to the hearing on the ground that he was already under indictment but did answer some of the questions, stating that he did not know where the books were. He finally claimed the privilege against self-incrimination and was excused.

On December 2, 1949, the grand jury returned an indictment against petitioner and the corporate defendant which superceded the indictment of October 27, with differences only as to matters of form (see 122 F. Supp. at 919). During the trial, petitioner changed his plea to guilty, after the trial court examined petitioner to make certain he understood the nature of his plea (see R. 11-12).

ARGUMENT

Petitioner's latest attack on his conviction presents no grounds which would justify vacation of the judgment entered on his voluntary plea of guilty. He was not entitled to have counsel at the time he actu-

ally testified before the grand jury since counsel is not one of the persons whose presence is authorized under Rule 6(d), F. R. Crim. P.[1] Petitioner, moreover, was summoned to produce books and records of the corporation. He was advised of his right to claim the privilege and he had previously consulted with his attorney. His claim of privilege was in fact honored. Thus there is no merit in his attack on the proceedings before the grand jury. And, even if there were, this would present no basis for vacating the judgment since petitioner, with full knowledge of the facts as to his appearance, nevertheless pleaded guilty to the indictment returned subsequent to his appearance before the grand jury.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JANUARY 1960.

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[1] Petitioner's reliance on *In re Groban*, 352 U.S. 330, is misplaced. That decision recognizes that a witness before a grand jury cannot insist on being represented by counsel and that the protection of the witness lies in the privilege against self-incrimination. See 352 U.S. at 333.

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